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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS ANTHONY BERNABEI, Defendant and Appellant.	H045459 (Santa Clara County Super. Ct. No. C1503235)

I. INTRODUCTION

Defendant Louis Anthony Bernabei pleaded no contest to second degree murder and was sentenced to prison for 15 years to life. (Pen. Code, § 187.)[1] The sentencing court also ordered that he have no contact with the victim's family, and that he pay a restitution fine of $10,000 and a corresponding suspended parole revocation restitution fine of $10,000.

On appeal, defendant contends the no-contact order was unauthorized and that the fines must be reduced. The Attorney General concedes that the trial court erred by imposing the no-contact order but contends that defendant fails to show error in the setting of the fines.

[1] All further unspecified statutory references are to the Penal Code.

For reasons that we will explain, we will strike the no-contact order and order the trial court to amend the abstract of judgment to omit the reference to the no-contact order. As modified, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Offense*[2]

On the afternoon of April 21, 2014, defendant was driving on State Route 85 when he hit a Mazda that was stopped on the shoulder. The Mazda was pushed into traffic where it was hit by a second vehicle. The Mazda's occupants were a woman and her two children. One child, an eight-year-old, was pronounced dead at the scene. The other child and the woman sustained injuries. Witnesses reported that defendant was driving erratically, swerving side to side, and going about 70 miles per hour before he hit the Mazda. Defendant reported that he had taken prescription medication earlier in the day and admitted that he should not have been driving.

B. *The Charges and Plea*

On April 28, 2016, defendant was charged by information with the murder of the child (§ 187; count 1), driving under the influence of a drug causing injury to the two other victims (Veh. Code, § 23153, former subd. (e); count 2), and misdemeanor driving under the influence of a drug (Veh. Code, § 23152, former subd. (e); count 3). Count 2 also included enhancement allegations.

On September 13, 2017, defendant pleaded no contest to second degree murder (§ 187; count 1), with the understanding that he would receive 15 years to life in prison. The remaining counts were submitted for dismissal with a *Harvey* waiver.[3] In his written plea form, defendant indicated his understanding that he would be ordered to pay a mandatory restitution fine of $300 to $10,000.

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[2] As defendant was convicted by plea, the summary of his offense is taken from the probation report.

[3] *People v. Harvey* (1979) 25 Cal.3d 754.

C. *Sentencing*

In an interview with the probation officer prior to sentencing, defendant expressed remorse and indicated that he was "writing a letter to the victim's family since he cannot express his feelings." In the probation report, the probation officer recommended that defendant "not knowingly have contact with the victim(s)." The probation officer also recommended that defendant pay a restitution fine of "$10,000 . . . under the formula permitted by Penal Code Section 1202.4(b)(2)."

The sentencing hearing was held on January 12, 2018. The prosecutor indicated that he had received a letter by defendant from defense counsel, that he (the prosecutor) had read the letter "which the People certainly appreciate," and that he would "forward that to the victim's family as well." The trial court sentenced defendant to 15 years to life in prison. The court ordered defendant to "not knowingly have contact with the . . . victim's family in this case."[4] The court also made a general order of restitution. The court further ordered defendant to pay a "[r]estitution fine of $10,000 . . . imposed under 1202.4(b)(2)" and a suspended parole revocation restitution fine in the same amount under section 1202.45. The remaining counts were dismissed.

III. DISCUSSION

A. *The No-Contact Order*

Defendant contends that the trial court erred at sentencing by ordering that he have no contact with the victim's family. Defendant argues that the no-contact order was not authorized under section 136.2, and that he may raise the issue for the first time on appeal. He further contends that the no-contact order was not supported by substantial evidence, that the order is unconstitutionally vague, and that trial counsel rendered ineffective assistance by failing to object below.

[4] The minutes from the sentencing hearing and the abstract of judgment indicate that defendant was ordered not to have contact with the "victim or family."

The Attorney General concedes that the no-contact order is unauthorized and should be stricken.

Neither the trial court in imposing the no-contact order, nor the probation officer in recommending the order, identified the legal or factual basis for the order. Where a protective order is unauthorized, a defendant may challenge the order for the first time on appeal. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382 (*Ponce*).)

Section 136.2, subdivision (a) authorizes the issuance of an order to protect a victim or witness in a criminal matter. (*Id*., subd. (a)(1).) However, "[t]he courts have construed section 136.2, subdivision (a) to authorize imposition of protective orders only during the pendency of the criminal action. [Citations.] Thus, once the defendant is found guilty and sentenced, the court's authority to issue a protective order under section 136.2, subdivision (a) generally ceases. [Citations.]" (*People v. Beckemeyer* (2015) 238 Cal.App.4th 461, 465 (*Beckemeyer*).)

Section 136.2 has been amended to create "exception[s] to the preconviction limitation of a section 136.2 restraining order." (*Beckemeyer*, *supra*, 238 Cal.App.4th at p. 465.) Section 136.2, subdivision (i)(1) now provides that, for certain types of crimes, "the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a victim of the crime." (See also *id.*, subd. (i)(2).) The enumerated crimes generally involve domestic violence, sex crimes, gang crimes, or crimes requiring the defendant to register as a sex offender pursuant to section 290, subdivision (c). (§ 136.2, subd. (i)(1); see also *id.*, subd. (i)(2).)[5]

[5] At the time defendant was sentenced, section 136.2, subd. (i) stated in part: "(1) In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of Section 261, 261.5, or 262, a violation of Section 186.22, or a crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any (continued)

In this case, defendant was not convicted of any of the enumerated crimes involving domestic violence, a sex crime, a gang crime, or a crime requiring sex offender registration pursuant to section 290, subdivision (c). (See § 136.2, subd. (i)(1), (2).) Thus, as defendant contends, and the Attorney General concedes, the postconviction no-contact order was not authorized by section 136.2.

The Attorney General argues that "[t]here may be instances in which a trial court has the inherent authority to issue a protective order." The Attorney General concedes, however, that the trial court erred in issuing such an order in this case.

As one appellate court has explained, even if a trial court "relie[s] on 'inherent judicial authority' to issue its order," " ' "[i]nherent powers should never be exercised in such a manner as to nullify existing legislation . . . ." ' [Citation.]" (*Ponce*, *supra*, 173 Cal.App.4th at p. 384.) "An existing body of statutory law regulates restraining orders. . . . Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives. [Citation.]" (*Ibid.*) "Moreover, even where a court has inherent authority over an area where the Legislature has not acted, this does not

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contact with a victim of the crime. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail or subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of a victim and his or her immediate family. [¶] (2) In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of Section 261, 261.5, or 262, a violation of Section 186.22, or a crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a percipient witness to the crime if it can be established by clear and convincing evidence that the witness has been harassed, as defined in paragraph (3) of subdivision (b) of Section 527.6 of the Code of Civil Procedure, by the defendant."

authorize its issuing orders against defendants by fiat or without any valid showing to justify the need for the order. [Citation.]" (*Ibid.*; accord, *People v. Robertson* (2012) 208 Cal.App.4th 965, 996.)

In this case, the record does not reflect that the prosecutor sought the protective order. The record also fails to reflect a need for the order. To the extent defendant sought to communicate with the family of the deceased victim, the record reflects that defense counsel transmitted defendant's letter to the prosecutor, and the prosecutor expressed appreciation for the letter based on its content. On this record, we find appropriate the Attorney General's concession that the trial court erred in ordering that defendant have no contact with the victim's family. In view of our conclusion that the no-contact order must be stricken, we do not address defendant's other claims of error concerning the order.

B. *Restitution Fine*

Defendant contends that the trial court's imposition of a $10,000 restitution fine was "contrary to the court's stated intent to calculate the restitution fine[] 'under 1202.4(b)(2),' and thus constituted a mistake of fact, misapplication of the law, and abuse of discretion." In recognition that his trial counsel failed to object to the restitution fine below, defendant argues that counsel rendered ineffective assistance. He contends that this court should reduce the two fines to $4,500 each to reflect the calculation of the restitution fine under the statutory formula, or remand the matter for the trial court to "exercise its discretion lawfully."

The Attorney General contends that defendant forfeited his claim by failing to raise it below, that defendant cannot establish a claim of ineffective assistance of counsel, and that alternatively, the trial court properly exercised its discretion in setting the restitution fine.

At the time of defendant's offense in 2014, section 1202.4 provided that the amount of the restitution fine "shall be set at the discretion of the court and

commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than . . . three hundred dollars ($300) . . . and not more than ten thousand dollars ($10,000)." (§ 1202.4, former subd. (b)(1).)

Subdivision (b)(2) of section 1202.4 sets forth the following formula that a trial court may use in setting the amount of the restitution fine: "[T]he court may determine the amount of the fine as the product of the minimum fine . . . multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

Section 1202.45 requires the court to impose a parole revocation restitution fine in the same amount as the restitution fine under section 1202.4, with the additional fine suspended unless and until parole is revoked. (§ 1202.45, subds. (a) & (c).)

We ordinarily review a restitution fine under section 1202.4 for abuse of discretion. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) However, "all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review. [Citations.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852; see also *People v. Wall* (2017) 3 Cal.5th 1048, 1075; *People v. Scott* (1994) 9 Cal.4th 331, 351-354, 356.) In this case, defendant did not object to the restitution fine in the trial court. We therefore turn to defendant's contention that trial counsel rendered ineffective assistance by failing to object to the restitution fine.

" 'In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] . . . If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." [Citation.]' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).)

In contending that his trial counsel rendered ineffective assistance, defendant primarily relies on two cases from this court. We find both cases distinguishable.

In *People v. Le* (2006) 136 Cal.App.4th 925 (*Le*), this court determined that the restitution fine should be reduced, based on the statutory formula and after exclusion of one of defendant's convictions from the calculation. (*Id.* at pp. 935-936.) The trial court had ordered the defendant to pay a restitution fine of " '$4,800 under the formula permitted by [section] 1202.4.' " (*Id.* at p. 932.) This court observed that the record "indicate[d] that the trial court relied on the formula provided by section 1202.4, subdivision (b)(2)" (*id.* at p. 935), where "the product of $200 multiplied by defendant's sentence of 12 years four months (rounded to 12 years), multiplied by defendant's two felony convictions, is $4,800" (*id.* at p. 933). This court concluded that it was "reasonably probable that the trial court would have imposed a smaller restitution fine" if trial counsel had objected to the improper inclusion of one of defendant's convictions and its corresponding sentence, which should have been stayed under section 654, in the restitution fine calculation. (*Le*, *supra*, at p. 935; see *id.* at p. 934.)

Similarly, in *People v. Martinez* (2014) 226 Cal.App.4th 1169 (*Martinez*), this court concluded that the restitution fine should be reduced, based on the statutory formula and a minimum fine of $200. (*Id.* at p. 1190.) In *Martinez*, the trial court had "ordered a restitution fine 'in the amount of $280 times the number of years, times the number of felony counts, for a total restitution fine in the amount of $12,320.' " (*Id.* at p. 1188.) In expressly applying the statutory formula, the trial court used the $280 minimum fine applicable in 2013, even though the defendant's crime had occurred in 2011, when the minimum fine was only $200. (*Id.* at p. 1189 & fn. 13.) This court held that there was no conceivable tactical reason for trial counsel not to object to the use of the incorrect minimum statutory fine. (*Id.* at p. 1190.) This court explained that, "given the [trial]

court's commitment to use the statutory formula in Penal Code section 1202.4, subdivision (b)(2), it appears more than likely that the [trial] court would have imposed the restitution fund fine using the $200 minimum that was in effect when [the defendant] committed his crimes had counsel raised an objection at the sentencing hearing." (*Ibid*.)

In contrast to *Le* and *Martinez*, where the records reflected that the restitution fines imposed by the trial court were *consistent* with the trial court's use of the statutory formula (albeit with the wrong variables), in this case, as defendant himself points out, the ordered $10,000 restitution fine is "inconsistent" with the application of the statutory formula. The trial court may have miscalculated the fine as $10,000 under the statutory formula, *or* the court may have intended to impose a $10,000 fine but misspoke when citing to section 1202.4, subdivision (b)(2). Thus, if defendant's trial counsel had objected to the restitution fine at sentencing, it is not clear from the record whether the court would have imposed a *lesser* amount according to the formula under section 1202.4, subdivision (b)(2), or imposed the *same* $10,000 fine but cited a different statutory basis for the fine under subdivision (b)(1) or (d).[6] Because it is not clear from the record whether the trial court intended to use the statutory formula in calculating defendant's restitution fine, defendant fails to demonstrate prejudice from trial counsel's purported deficient performance in not objecting. (See *Lopez, supra*, 42 Cal.4th at p. 966.)

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[6] Section 1202.4, subdivision (d) states in part: "In setting the amount of the fine . . . in excess of the minimum fine . . . , the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required."

IV. DISPOSITION

The no-contact order that was imposed during the January 12, 2018 sentencing hearing is stricken. The trial court is directed to prepare an amended abstract of judgment that omits any reference to the no-contact order and to forward a copy of the abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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